No. 12590

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. McCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. McCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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The Court Erred in Giving Government's Instruction No. 19-A.

This point is discussed in our Opening Brief at pages 26-38; it is discussed in Appellee's Brief at pages 19-31.

Although we discussed this point as our Point II, we discuss it here first, because the appellee concedes that the instruction was improper; and being improper it follows that the judgment of the lower court for this reason alone must be reversed.

The instruction, which appellee attempts to justify as a harmless error, was basically and jurisdictionally faulty in two aspects: (A) The Court told the jury that it was an offense to pre-season feed which is not an offense

created by the act or regulations; and (B) the Court submitted as an offense one not charged in the information.

(A) The instruction as given to the jury tells them that the indirect method "consists of pre-season feeding" as distinguished from the "direct method" of placing the feed in front of shooting blinds during the open season. By this instruction the jury was told that any pre-season feeding, no matter when it occurred, so as to keep the birds there to be shot after the season opens, is a violation. The statute creates no such offense. The regulation, pursuant to the statute, is against luring, attracting or enticing by feed "to, on or over the area *where hunters are attempting to take them*" either "directly or indirectly." [R. 16.] Thus, migratory birds may not be taken "directly or indirectly" by means of bait, luring the birds to the hunting area during the open hunting season, grain spread before the "bird blinds themselves" or "more widely scattered" over the hunting area where the hunters are attempting to take them. [R. 17.] The baiting must be contemporaneous with the taking or attempted taking of the birds. The regulation here involved *does not* prescribe against pre-season feeding, as the Court instructed the jury.

The information charged that the defendants "did take, hunt and kill, migratory waterfowl and migratory game birds *over baited ponds and areas.* . . ." [R. 2.]

Appellee states at page 24 of its brief, "* * * There would be no violation if the pre-season feeding of grain resulted in the grain or other food put out being consumed by the birds, or being covered up by the owners of the land, or those who desired to shoot over such premises." And again appellee, at page 25, admits the

correctness of our position when he says, "There is nothing in the regulations or the Act itself which expressly prohibits the pre-season scattering of grain or wild fowl feeding." The trial court's instruction is directly to the contrary. This is a clear admission of our position.

We give the further illuminating confessional quotes from pages 28-29 of Appellee's Brief: "It may be said that Instruction 19-a was *superfluous;* that it was *unnecessary* once the mandatory instructions on the law of the case and the elements of the offense had been stated to the jury." "* * * It is submitted that the jury could not have been misled by the one in question which could have been *safely omitted."* "* * * and while the attempt at further clarity may have resulted in some obscurity, * * *"

Although conceding that pre-season feeding is not an offense, the appellee attempts to justify the erroneous instruction on the premise that "it was cured by the submission to the jury of a clear issue of fact as to whether or not at the opening of the season barley and beans were present in sufficient quantities to induce or entice ducks. . . . to be shot by the hunters on the premises." (P. 25.)

Thus, we have appellee arguing that because the Court correctly submitted the issue as to what constituted a violation as to one phase of the case, it cured the error in submitting to the jury as a violation another phase of the case which he admits does not constitute a violation of the Act or regulation. This is not the law and is an utter absurdity.

Appellee, after acknowledging—as we have seen—that there is nothing in the regulations or the act itself which expressly prohibits pre-season feeding, in desperation to further justify his position that it was harmless,

states that it was taken verbatim from a portion of the opinion in a civil action—the *Cerritos* case—which he acknowledges was dictum, and further (p. 27) says, "Where then, may a trial court go for better guidance for its jury instructions on the law of a case such as the one in which appellants were tried and convicted." This is no justification. In fact this is a classical example of the obvious danger of thus lifting without regard to context or appropriateness, or argumentative character, portions of a court's opinion, and giving it to a jury as an instruction.

The cases cited at pages 29-31 of Appellee's Brief have no application whatsoever to our problem. This is not a case of detached phrases and sentences which might be reconciled with other instructions given and from the entirety that it can be said correctly submitted the issues to the jury. Here we have a plain case of submitting to the jury as an offense something not created by statute as an offense. It can even be said that it is not a matter of inconsistent instructions, but a case of super-imposing upon the whole body of the instructions additional acts as constituting a violation of the statute and regulations which is not contained therein, and which is not even charged.

There are many cases, of course, which hold that "where two instructions are given, one erroneous and prejudicial and the other correct, reversible error occurs."

United States v. Nicola, 72 F. 2d 780;

United States v. Thomas, 151 F. 2d 183;

United States v. Miller, 120 F. 2d 968;

United States v. Notary, 16 F. 2d 780.

(B) The Court submitted to the jury as an offense one not charged in the information. Conviction on charge other than as made by grand jury presentment is jurisdictional and therefore void.

Ex Parte Bain, 121 U. S. 1, 13, 30 L. Ed. 849.

In *Edgerton, et al., v. U. S.,* 143 F. 2d 697 (C. C. A. 9), it was held that an instruction striking from indictment reference to type of security on which money was loaned was error as changing character of representation as alleged, and amending indictment so as to result in trial of defendants on a charge different from that found by grand jury and was violative of the Fifth Amendment to the Constitution.

Also see,

Mahler v. Eby, 264 U. S. 32, 268 L. Ed. 549;

Thornhill v. State of Alabama, 310 U. S. 87, 96, 84 L. Ed. 1093;

DeJonge v. Oregon, 299 U. S. 353, 362, 81 L. Ed. 278, 282;

Stromberg v. California, 283 U. S. 359, 367, 368, 75 L. Ed. 1117, 1122, 1123.

Appellee presents no reply whatever to our points (pp. 35 and 36) that this instruction was further faulty (a) for failure to define what is meant by "whereupon the hunters may flush or punt over preserves" and (b) for instructing on a matter which was not in issue by any evidence whatsoever.

Under the State of the Evidence the Trial Court Should Have Submitted the Issue of Entrapment to the Jury Under the Proper and Applicable Instructions Requested by the Appellants.

The question posed is that the Court should have submitted the issue under proper instructions to the jury, as held in *Sorrells v. U. S.*, 287 U. S. 435, and other cases cited at pages 23 and 25 of our brief. None of the cases cited by appellee are applicable except *Brown v. U. S.*, 260 Fed. 752, which was decided some years before the case of *Sorrells, supra.*

At page 20 to page 23 of our Opening Brief, we have summarized the pertinent facts from our statement of the facts in evidence, pages 3 to 6, which required the giving of an instruction on entrapment under the state of the evidence in two aspects of the case: (1) The evidence of inducement to put out pre-season feed for the birds, in the light of the Court's instruction that the regulation was violated by pre-season feeding, and (2) the evidence of enticement and inducement to shoot after the opening of the season over alleged baited ponds.

Appellee is in error when it states that we rely only upon the leading case of *Sorrells v. United States, supra.* We have cited a number of cases in addition at pages 24-25 of our brief on the requirement of such an instruction to the jury under the circumstances. Appellee does not challenge the correctness of our statement of facts. Appellee does, however, assert at page 15 of his brief, incorrectly that "at no time or place did any warden tell appellants they could go ahead and shoot if grain or feed still remained there." The record is precisely to the contrary. [R. 417, 324, 175-176.]

Conclusion.

For each and all of the reasons herein set forth and in our Opening Brief, it is submitted that the judgment should be reversed.

Respectfully submitted,

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